IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VPP GROUP, LLC,

Plaintiff,

v.

OPINION AND ORDER

13-cv-185-wmc

TOTAL QUALITY LOGISTICS, LLC,
and TOTAL QUALITY LOGISTICS, INC.,

Defendants.

In this lawsuit, plaintiff VPP Group alleges that the failure of defendants Total Quality Logistics, LLC, and Total Quality Logistics, Inc. ("TQL") to accomplish the timely delivery of its beef to a customer in California, and their subsequent unauthorized resale of the beef, violated Wisconsin state law on four separate counts: (1) breach of contract; (2) negligence; (3) civil theft under Wis. Stat. § 895.446; and (4) conversion. Pursuant to Fed. R. Civ. P. 12(b)(6), TQL now moves to dismiss Counts 2-4 of the complaint as preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 14501(c). For the reasons discussed below, the court finds that the ICCTA preempts Count 2, but not Counts 3 and 4.

BACKGROUND[1]

VPP is in the business of processing and selling beef. On October 30, 2012, VPP hired TQL to arrange transportation of a large shipment of its beef from Wisconsin to California by truck. TQL found a trucker for the job.

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[1] The court takes the following alleged facts from VPP's complaint, drawing all reasonable inferences in its favor as the non-moving party.

While the beef was picked up on schedule, it was delivered 36 hours late, apparently because of a mechanical failure en route. As a result of the delay, VPP alleges that the beef was rejected by its customer.

Rather than let the beef sit indefinitely in storage, TQL then sold the beef on its own initiative for $44,000. Unfortunately, this represented a significant discount on the $100,248 VPP was to have received under the original contract with its customer.

OPINION

I. Procedural Posture

Before addressing the merits of TQL's federal preemption argument, the court first briefly considers — and rejects as flawed — VPP's assertion that dismissal on the basis of preemption or any other affirmative defense is unavailable under a Rule 12(b)(6) motion.

Black's Law Dictionary defines an affirmative defense broadly as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary, "Defense — Affirmative Defense" (9th ed. 2009). As that definition suggests, the essence of an "affirmative defense" is that the defendant bears the burden of asserting it, and if necessary, of proving relevant facts. See *Jones v. Bock* 549 U.S. 199, 211-12, 127 S. Ct. 910, 919 (2007) (an affirmative defense places the burden of pleading and proof on the defendant).

Seventh Circuit precedent on whether an affirmative defense can be raised in a 12(b)(6) motion is arguably muddled by unqualified pronouncements, but fortunately not so badly that it prevents a straightforward resolution here. Some cases have held that "[d]ismissing a case on the basis of an affirmative defense is properly done under Rule 12(c), not Rule 12(b)(6)." *Yassan v. J.P. Morgan Chase and Co.*, 708 F.3d 963, 975 (7th Cir. 2013). See also *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 n. 1 (7th Cir. 2012); *Carr v. Tillery*, 591 F.3d 909, 913 (7th Cir. 2010). This would obviously be true if the basis for the motion depends, at least in part, on affirmative allegations contained in the defendants' responsive pleading. In contrast, other cases instruct that "when a plaintiff's complaint . . . sets out all of the elements of an affirmative defense, dismissal under Rule 12(b)(6) is appropriate." *Independent Trust Corp. v. Stewart Info. Serv's Corp.*, 665 F.3d 930, 935 (7th Cir. 2012). See also *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009); *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008); *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005).

This latter group of cases is consistent with the Supreme Court's most recent admonition on the subject. In *Jones v. Bock*, Chief Justice Roberts explained that

> a complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim; that does not make the statute of limitations any less an affirmative defense, see Fed. Rule Civ. Proc. 8(c). Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract.

549 U.S. at 215, 127 S.Ct. at 920-21. Accord *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008) (cogently discussing *Jones v. Bock* and this very issue).

Because the federal preemption argument advanced by TQL does not introduce or rely upon any new factual allegations, it is a proper subject for Rule 12(b)(6) dismissal.

II. Preemption

This brings the court to TQL's motion to dismiss VPP's common law claims of negligence, theft and conversion on the grounds that each is expressly preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 14501(c). Express preemption exists where Congress has "define[d] explicitly the extent to which its enactments pre-empt state law." *English v. General Elec. Co.*, 496 U.S. 72, 78, 110 S. Ct. 2270, 2275 (1990).

A. Standard

In 1978, Congress passed the Airline Deregulation Act ("ADA"), Pub. L. 95–504, Stat. 92 Stat. 1705, in an attempt to remove federal government control over the commercial aviation business. To free the airlines from corresponding state regulation, the ADA explicitly preempted "any [state] law, regulation, or other provision having the effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(4)(A). Congress later took similar steps to deregulate the trucking industry, first through the Motor Carrier Act of 1980, Pub. L. No. 96–296, 94 Stat. 793, and then through the Federal Aviation Administration Authorization Act ("FAAAA"), Pub. L. No. 103–305, 108 Stat. 1569, which contained an express preemption of state law governing motor carriers almost identical to the provision for airlines found in the ADA.

Eighteen months later, Congress expanded the express preemption of state law to freight forwarders and brokers, through the Interstate Commerce Commission Termination

Act of 1995 ("ICCTA"), Pub.L. No. 104–88, 109 Stat. 803, 49 U.S.C. § 14501(c)(1).[2] The ICCTA's preempting statutory section provides in pertinent part:

> [A] State . . . may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

The parties agree that TQL is a "broker" as statutorily defined. Their dispute centers on whether VPP's tort and statutory claims fall within the scope of § 14501(c)(1)'s express preemption of state laws "related to a price, route, or service of any . . . broker." This court is instructed to start with the plain language of the provision. *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013). There is, however, a degree of vagueness inherent in the term "related to," which would portend a challenging line-drawing exercise but for numerous courts that have already construed that term in similar contexts. Their decisions provide a useful — if still fluid — interpretive framework.

Because the preemption language for freight brokers in § 14501(c) was expressly modeled on the preemption clause of the ADA, 49 U.S.C. § 41713(b)(4)(A), courts refer to cases construing the preemption language of the ADA, as well as the FAAAA and the ICCTA. See *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 551 (7th Cir. 2012) ("[W]e are confident that we too should rely as need be on the ADA decisions.").

The Supreme Court has identified some ground rules for deciding whether a state law is "related to" a price, route or service, holding that preemption

[2] In the ICCTA, Congress also re-numbered the relevant provision of the FAAAA to its present location at 49 U.S.C. § 14501. It had initially been codified at 49 U.S.C. § 11501(h).

> may occur even if a state law's effect on rates, routes or services "is only indirect"; . . . it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and . . . pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives. . . . of helping assure that transportation rates, routes, and services reflects maximum reliance on competitive market forces . . . .

Rowe v. N. H. Motor Transport Ass'n, 552 U.S. 364, 370-71, 128 S. Ct. 989, 991 (2008) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 112 S. Ct. 2031 (1992)).

The Seventh Circuit's recent decision in *S.C. Johnson & Son* provides further guidance, helpfully cataloging appellate cases that roughly divide laws that are and are not preempted by the § 14501(c). *Id.* at 552-58. Unsurprisingly, the *S.C. Johnson & Sons* survey suggests that preemption cases tend to hinge on two major questions: (1) the scope of the term "related to"; and (2) the definition of the terms "prices," "routes" and "services."

As for the scope of "related to," the consensus seems to be that even general restrictions on behavior will be found partially preempted if they directly constrain private parties' bargaining or decision making about prices, routes or services. This is true whether the restriction is a product of statute, *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 227, 115 S.Ct. 817, 823 (1995), or of common law, *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000). In the context of a dispute about private price- and route-setting agreements among airlines, as an example, the Seventh Circuit found general tort laws barring fraud were preempted by the ADA, because those laws would effectively force the litigants to change the prices and routes they had adopted by private agreement. *United Airlines,* 219 F.3d at 608-09. Similarly, in *Data Manufacturing Inc. v. UPS, Inc.*, 557 F.3d 849 (8th Cir. 2009), the Eighth Circuit found state tort liability for conversion and tortious misrepresentation preempted a claim that UPS had overbilled its customers for shipping charges, because billing was a "necessary component of its business operations" and because compliance with duties under state tort law conflicted with UPS's chosen billing practices (i.e., its provision of "services"). *Id.* at 852.

In *S.C. Johnson & Son*, the Seventh Circuit found that the plaintiff's fraudulent misrepresentation and conspiracy to commit fraud claims against a transportation company were preempted as related to the prices, routes and services offered, while claims of bribery and racketeering were not. *S.C. Johnson & Son*, 697 F.3d at 558-59. The court carefully explained that applying state tort standards related to fraudulent communications would "substitute a state policy (embodied in law) for the [price] agreements that the parties had reached," injecting state standards of conduct directly into an otherwise unfettered dialogue between shipper and customer over prices. In contrast, the racketeering and bribery claims were targeted at conduct one step removed from the bargaining process, albeit conduct calculated to impact the course of bargaining. The increased distance from the price-setting negotiations was enough to withdraw these claims from the scope of preemption. *S.C. Johnson & Son*, 697 F.3d at 558-59.

As for disagreements about the definition of "prices," "routes," and "services," the last of the three terms seems by far the most ambiguous and open for debate. While *Data Manufacturing* had no trouble finding that billing was a component of the "services" provided to customers by UPS, the Fifth Circuit came to the opposite conclusion with respect to alleged defects in airlines' overhead luggage storage and passenger screening methods. See *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995), and *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995). Those cases seemed to draw "a line between matters such as access to flights, class-of-service upgrades, and prices, on the one hand, and personal physical injuries or property damage caused by the operation and maintenance of aircraft, on the other." *S.C. Johnson & Sons*, 697 F.3d at 555.

B. Application to Claims

Having established a rough understanding of how previous cases have interpreted the key language in the preemption clause at issue, it is time to turn to the claims presented by VPP.

1. Negligence claim

VPP's negligence claim asserts that TQL "was negligent in hiring and supervising the trucking company it hired to perform [the] delivery and was further negligent in monitoring the delivery and failing to discover that its trucking company had failed to deliver the beef until after the shipment would no longer be received by VPP's customer." (Compl., dkt. #1-2, at 16.) VPP does not dispute that hiring and supervising the trucking company and monitoring the progress of the shipment were responsibilities that fell within the scope of essential "services" to be provided by TQL as a shipping broker. Nor does VPP dispute that the asserted negligence claims effectively impose a state law standard of conduct that would constrain a broker's decision making in terms of how to provide such services. As such, VPP effectively concedes that the negligence claim is preempted.

VPP's only real argument to the contrary is that negligence laws are not "related to" TQL's services because — purely as a matter of fact — the enforcement of a $63,748 tort claim against TQL is unlikely to have a "significant economic impact" on its business decisions regarding prices, routes or services. VPP's use of the phrase "significant economic impact" attempts to invoke a particularly narrow preemption test articulated in *Travel All*

Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996). In that case, the Seventh Circuit held that a state law "relates to" prices, routes or services, "either by expressly referring to them or by having a significant economic effect upon them."[3] *Id.* at 1432 (7th Cir. 1996). The *Travel All Over the World* court came up with this test by tracing the preemption analysis applied by the Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031 (1992), a case discussing whether state advertising restrictions were "related to" airline ticket prices.

The Seventh Circuit's *Travel* test is, therefore, colored by the somewhat unique facts (and therefore analysis) in *Morales*. The test's focus on the economic effects of a challenged regulation is a reflection of the in-depth analysis of the market impact of advertising on price, a question that intrigued the *Morales* court. Applied to services and routes more generally, however, the test incompletely captures the various ways that state laws may "relate to" business decisions in the transportation industry, even where the laws do not expressly reference transportation. No surprise, therefore, that the Seventh Circuit mentioned its earlier decision in *Travel All Over the World* only in passing in *S.C. Johnson & Son*, favoring a more open-ended analysis of the "related to" standard rather than the somewhat unusual *Travel* test.

Even under the *Travel* test, VPP's negligence claim is preempted. VPP would have the court determine whether *its* tort claim alone would inflict enough economic pain on TQL to make it change its business practices, but this is not the appropriate inquiry. Rather, the

[3] In fact, the *Travel* court articulated multiple versions of the test, at times using the phrase "having a connection with or reference to" *id.* at 1430, and at times using the phrase "expressly referring to . . . [or] having a significant economic effect upon," *id.* at 1432. The second of these phrases — the one TQL relies upon here — is both broader than the usual version of the test (in acknowledging indirect economic effects) and narrower (in requiring, absent significant economic effects, an express reference to the transportation industry).

court must determine whether application of this type of state tort law in this type of situation will have an economic effect on negotiated transportation prices, routes or services. To this, the answer is surely "yes."[4]

2. Civil theft and conversion claims

Civil theft under Wisconsin Statutes § 943.20 and Wisconsin common law conversion are arguably further removed from the negotiation or provision of transportation prices, routes or services, because both provide a remedy for the intentional deprivation of another's possessory right to property. *Compare* Wis. Stat. § 943.20 *with H.A. Friend & Co. v. Prof'l Stationery, Inc.*, 2006 WI App. 141, ¶11, 294 Wis. 2d 754, 720 N.W.2d 96. VPP asserts that just such an intentional property deprivation took place when TQL resold its cargo of beef to a third party without VPP's approval.

In arguing that these claims are expressly preempted as laws "related to" prices, routes or services, TQL contends that resale of the rejected goods was a "service" provided by TQL in its capacity as a broker. Assuming that to be true for the moment, TQL's argument still breaks down at the point of showing that conversion and theft laws are "related to" this service. This is because conversion and civil theft remedies would have no direct bearing on a broker's conduct in attempting to sell rejected goods as authorized by contract or other law. For example, when a broker decides whether and how to re-sell a shipment that has been

[4] By focusing on the economic impact of one lawsuit at a time, rather than on the expected impact of this *type of claim* on business decisions, VPP's approach would arbitrarily preempt big money suits while sparing small dollar suits premised on an identical theory of law. It is also unsupported by case law. The best that VPP can muster is a bit of *dicta* in a short unpublished opinion, and even the language in that case is ambiguous. See *Non Typical, Inc. v. Transglobal Logistics Group Inc.,* Nos. 10–C–1058, 11–C–0156, 2012 WL 1910076, at *3 (E.D. Wis. May 28, 2012) ("This finding is further consistent with the amount at stake in the case."). Other than this unmoored comment, *Non Typical* supports the proposition that a state law tort negligence claim should be preempted. *Id.* at 2-3.

rejected upon delivery, it must take into account all laws that govern how it can legally go about the sale, including whose permission it must obtain. Any law that would govern a broker's legal duties or responsibilities at that juncture can be said to "relate to" the service the broker is contemplating. Conversion and theft laws, on the other hand, *only* come into play in the re-sale scenario once it is determined that a broker has already *violated* the property rights of another.[5]

The distinction is between laws that *define* the rights and responsibilities that come with a given business relationship, and thus "relate to" (regulate) that business activity, and laws that primarily provide a remedy for conduct unrelated to the business relationship because it is unauthorized and uncontemplated, such as the intentional deprivation of another's property through conversion and theft. This distinction appears in harmony with the body of case law set forth in *S.C. Johnson & Sons*, as well as with the general observation made by the Seventh Circuit in that case that "laws prohibiting theft and embezzlement" merely "provide the backdrop for private ordering" and thus are not appropriate subjects for express preemption under 49 U.S.C. § 14501(c)(1). *S.C. Johnson & Son*, 697 F.3d at 558. Accordingly, the court finds that VPP's conversion and civil theft claims are not expressly preempted by § 14501(c)(1).[6]

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[5] Of course, this also assumes that TQL was not authorized by law to re-sell the shipment, as the court must for purposes of this motion to dismiss. Whether this is so must await a determination on summary judgment or trial.

[6] The court notes in passing that TQL makes extensive reference to the Carmack Amendment in its briefs, without adequately explaining why it is relevant to preemption under the ICCTA. The Amendment sets out standards of conduct for *common carriers*, "governs liability of a *common carrier* to a shipper for loss of, or damage to, an interstate shipment," and impliedly preempts state law in that arena. *N. Am. Van Lines, Inc. v. Pinkerton Sec. Sys., Inc.*, 89 F.3d 452, 455 (7th Cir. 1996) (emphasis added). The ICCTA's express preemption is wholly distinct from the implied preemption of carriers achieved by the Carmack Amendment. Although at least one non-precedential case has suggested otherwise, see

ORDER

IT IS ORDERED that defendants' motion to dismiss (dkt. #6) is GRANTED with respect to plaintiff's negligence claim and DENIED with respect to plaintiff's civil theft and conversion claims.

Entered this 1st day of July, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

Ameriswiss Tech., LLC v. Midway Line of Ill., Inc., 888 F. Supp. 2d 197 (D.N.H. 2012), the decision in that case appears to be a misreading of *York v. Day Transfer Co.*, 525 F. Supp. 2d 289, 301 (D.R.I. 2007), and is not followed here.